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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. ~~300~~ 74

UNITED STATES OF AMERICA,

Petitioner,

versus

ANTHONY LaFRANCA,

Respondent.

Reply for Respondent in Opposition to the Petition for Writ of Certiorari.

E. HOWARD M'CALEB,
Counsel for Anthony LaFranca,
Respondent.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 800

UNITED STATES OF AMERICA,

Petitioner,

versus

ANTHONY LaFRANCA,

Respondent.

Reply for Respondent in Opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

This application should be denied. The reasons advanced by the Government for the granting of the writ are in discord with the settled jurisprudence of this Court.

The petition for allowance of the writ is apprehensive of a state of facts which does not exist in this case, and misconstrues the effect of the decision of the Circuit Court of Appeals, (Petition, pages 7, 8 and 9).

ARGUMENT.

(1) The suit here is one for penalties, and not taxes. (See *Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386).*

The petition seeks to recover taxes under Sec. 3244 R. S. as doubled by Sec. 35 of the National Prohibition Act; (thereby changing its nature from a tax to a penalty) a penalty for failure to file a return under Section 3176 R. S.; A special tax under Section 701 of the Revenue Act of 1924 as doubled by Section 35 of the N. P. A. (thereby changing its nature from a tax to a penalty) and for a further penalty of $500.00 under Section 35 of the National Prohibition Act, upon retail liquor dealers for selling liquor in violation of said National Prohibition Act.

The Circuit Court of Appeals held in conformity with the jurisprudence that the taxes under the Internal Revenue laws when doubled by Section 35 of the National Prohibition Act and assessed under the National Prohibition Act are penalties.

(2) It was further held that the limitations of Section 5 of the Willis Campbell Act, barring prosecution under the Internal Revenue Laws and under National Prohibition Act where there was a former conviction under one or the other, would apply to the case at bar.

The Circuit Court of Appeals did not decide, as the Government contends in its petition, that whenever an act

is a violation of the National Prohibition Act and also gives rise to liability for a **tax** under the Internal Revenue laws that it must elect whether it will collect the tax or prosecute the offender. If such were the case, the application would be well taken by virtue of *U. S. v. One Ford Coupe, 272 U. S. 321, 326.* It is conceded by us that one may be punished for law violation and be liable for taxes for dealing in the prohibited business. That is not the situation here. For the Government does not seek to recover taxes lost, but asks for the assessment of penalties incurred by law violation for which the defendant had already been punished. The Court below held that this suit was in contravention with the limitations expressed in Section 5 of the Willis Campbell Act and the use of the National Prohibition Act as a yardstick in doubling the taxes and making them penalties could not defeat the obvious intention of Congress in providing limitations upon the right of the Government to proceed.

(3) The position taken by the application is untenable, for, if the proceeding here is not barred by the Willis Campbell Act as the Circuit Court of Appeals held, it is barred by the Fifth Amendment of the Constitution prohibiting double jeopardy. That this suit is for penalties has been concluded by *Lipke v. Lederer, supra.* Therefore, if the suit is not barred by Section 5 of the Willis Campbell Act, as being a prosecution under the Internal Revenue Laws, it is barred because it is seeking a second punishment against the defendant for the same act, in violation of the Constitution. (See *U. S. v. McKee Federal cases No. 15,688; U. S. v. Lechenger, 173 Fed. 1023; U. S. v. Cases of Champagne, 9 Fed. (2nd) 710; Stone v. U. S., 167 U. S.*

184; Coffey v. U. S., 116 U. S. 445; U. S. v. Chouteau, 102 U. S. 603; U. S. v. Gates Federal Cases No. 15,191; Murphy v. U. S., 272 U. S. 630.

Discussion of these cases is unnecessary except to say that a second prosecution is prohibited when the parties are the same and the same act or offense is sought to be punished. It is suggested by petitioner's brief that the offense is not the same because in the prosecution for selling whiskey the Government had only to prove the sale; whereas under the allegations of this suit for penalties, there must be evidence that the defendant was a "retail liquor dealer". In this statement petitioner errs, because the Internal Revenue laws define who are retail liquor dealers, and no evidence on this fact is necessary. (See *Revised Statutes, Sec. 3244, U. S. C. A. Title 26 Section 205).*

It is unimportant whether the Circuit Court of Appeals is correct in its interpretation of the limitation of Section 5 of the Willis Campbell Act, inasmuch as the result in denying the prayer of the suit is in accord with the jurisprudence. For if the penalties sought to be recovered are not barred by the Willis Campbell Act, the authorities above cited hold conclusively that the judgment prayed for could not be granted without placing the defendant twice in jeopardy, in contravention of the Fifth Amendment of the Constitution.

A word with reference to the authorities relied on by the Government.

U. S. v. Mount Clemens Beverage Co. (E. D. Mich. 23 F. (2nd) 885, and *U. S. v. Bullinger (E. D. N. Y.) 290*

Fed. 395, are directly in conflict with the jurisprudence of this Court in *U. S. v. Chouteau, supra; In re Lezynsky, Fed. Cases No. 8279*, is in conflict with *U. S. v. McKee, supra*, (the *McKee* case being identical with the case at bar). In passing, it may be observed that the *McKee* case was cited and quoted with approval by this Court in *Coffey v. U. S., supra*. Other cases cited in the Government's brief are without application to the issues here involved.

(4) Another point raised by us in this case, but only in the alternative, is the unconstitutionality of paragraph 9, Section 701 of the Revenue Act of 1924. This act is unconstitutional because of the manner of its attempted use in this case. For when the tax levied by this section is doubled and assessed under Section 35 of the National Prohibition Act, it becomes a penalty and not a tax. (See *Lipke v. Lederer, supra)*.

Having thus lost the character of a tax, we challenge the right of the United States to penalize a person for violation of a State law without impinging upon the power reserved to the States by the Tenth Amendment of the Constitution. This apt conclusion is apparent, from the decisions of this Court in *U. S. v. Lanza, 260 U. S. 377* and *Hebert v. Louisiana, 272 U. S. 312*.

The reasoning of the Government is inapplicable because it is assuming that what is being laid is a tax. The authorities cited, therefore, have no bearing on our contention.

The citation by the Government of the Webb Kenyon law (37 Stat. 699) and authorities upholding its valid-

ity, in support of the statute here, serves no plausible analogy to the attack made by us.

The Webb Kenyon Law and the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), were sustained upon the inherent power of Congress to regulate interstate commerce.

The point raised in the Court below was that Congress has no power to penalize a person for violating a State law.

CONCLUSION.

The case was decided correctly below. There is no valid reason for the granting of this application. The petition for *certiorari* should be denied.

Respectfully submitted,

E. HOWARD M'CALEB,
Attorney for Anthony LaFranca,
Respondent.